

United States  
Circuit Court of Appeals

For the Ninth Circuit.

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13  
COMMISSIONER OF INTERNAL REVENUE,  
Petitioner,

vs.

JOHN FRANCIS NEYLAN,  
Respondent.

\_\_\_\_\_  
Transcript of the Record  
\_\_\_\_\_

Upon Petition to Review a Decision of the United States  
Board of Tax Appeals.

FILED

SEP - 4 1937



**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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COMMISSIONER OF INTERNAL REVENUE,  
Petitioner,

VS.

JOHN FRANCIS NEYLAN,  
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**Transcript of the Record**

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**Upon Petition to Review a Decision of the United States  
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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer .....	13
Appearances .....	1
Clerk's Certificate .....	30
Decision .....	17
Docket Entries .....	1
Memorandum Opinion .....	14
Petition .....	3
Petition for Review with Proof of Service.....	17
Praeceptum .....	29
Stipulation of Facts.....	25



## APPEARANCES:

J. PAUL MILLER, Esq.,  
for Taxpayer.

O. W. SWECKER, Esq.,  
for Comm'r.

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Docket No. 82451

JOHN FRANCIS NEYLAN,  
Petitioner,  
vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DOCKET ENTRIES

1935

Dec. 16—Petition received and filed. Taxpayer notified. (Fee paid)

" 16—Copy of petition served on General Counsel.

1936

Jan. 21—Answer filed by General Counsel.

" 23—Copy of answer served on taxpayer.

May 8—Hearing set week of 7/6/36, at San Francisco, Calif.

July 6—Hearing had before Mr. Smith. Submitted on merits. Stipulation as to facts filed. Pet's brief due 8/5/36. Respondent's due 9/5/36. Reply due 9/20/36.

" 31—Transcript of hearing of 7/6/36 filed.

1936

Aug. 4—Motion for 30 day extension to file brief, filed by taxpayer. Granted to 9/4/36.

Sept. 4—Brief filed by taxpayer.

" 4—Motion for extension of 30 days to file additional supplementary brief filed by taxpayer.

" 4—Order granting motion for additional supplementary brief to Oct. 4, 1936, entered.

" 4—Copy of brief served on General Counsel.

" 5—Copy of order and motion served.

Oct. 19—Motion for leave to file supplemental brief filed by taxpayer, 10/19/36 Granted.

" 19—Supplemental brief filed by taxpayer.

" 20—Copy of motion and supplemental brief served on General Counsel.

1937

Jan. 18—Memorandum opinion rendered, Mr. C. P. Smith, Div. 5. Judgment of no deficiency will be entered.

" 18—Decision entered, Mr. Chas. P. Smith, Div. 5.

Apr. 13—Petition for review by United States Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

" 21—Proof of service filed by General Counsel.

June 1—Motion for extension to July 12, 1937 to complete and transmit record filed by General Counsel.

" 1—Order enlarging time to July 12, 1937 to complete and transmit record, entered.



1937

July 7—Praecipe filed—proof of service thereon.

” 12—Order enlarging time to July 31, 1937, to  
transmit and deliver record, entered. [1\*]

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United States Board of Tax Appeals

Docket No. 82451

JOHN FRANCIS NEYLAN,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:AR:E-1, dated September 20, 1935, and as a basis of his proceeding, alleges as follows:

(1) The Petitioner is an individual with his residence at 198 Mountain Home Road, Woodside, California.

(2) The Notice of Deficiency, a copy of which is attached hereto and marked Exhibit “A” was mailed to the Petitioner on the 20th day of September, 1935.

(3) The taxes in controversy are income taxes for the calendar year 1931, and in the sum of \$5,613.99.

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.

(4) The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) The Commissioner erred in increasing the ordinary net income reported in the taxpayer's return from \$81,488.30 to \$127,881.09, and in treating this sum as ordinary income, [2] exclusive of capital net loss.

(b) The Commissioner erred in disallowing the sum of \$46,392.79 as an ordinary loss, resulting in an increase of ordinary net income as reported in the return, from \$81,488.30 to \$127,881.09.

(c) The Commissioner erred in computing a surtax on the sum of \$127,881.09, instead of on the sum of \$81,488.30, as set forth in taxpayer's return.

(d) The Commissioner erred in determining that the amount of Petitioner's income subject to the normal tax for the year 1931 was and is the sum of \$110,375.02, and in determining that a normal tax in the sum of \$5,298.75 is due thereon.

(e) The Commissioner erred in computing a normal tax at the rate of 5% on the sum of \$102,375.02, and in determining a tax thereon in the sum of \$5,118.75, instead of computing said tax at the rate of 5% on the sum of \$55,982.23, resulting in a tax of \$2,799.11.

(f) The Commissioner erred in fixing and determining a total tax liability due from said Petitioner for the year 1931 in the sum of

\$15,159.35 instead of the sum of \$9,545.36 as set forth in the taxpayer's return.

(g) The Commissioner erred in determining that a deficiency is due in the sum of \$5,613.99, or in any sum.

(h) The Commissioner erred in allowing but  $12\frac{1}{2}\%$  of the alleged capital net loss of \$54,657.60, as a deduction, [3] which  $12\frac{1}{2}\%$  amounts to \$6,832.07, instead of allowing  $12\frac{1}{2}\%$  of the capital net loss of \$8,263.81, and allowing as an ordinary loss the sum of \$46,392.79, all as reported in Petitioner's income tax return for the calendar year 1931.

(i) The Commissioner erred in failing to allow as a deduction and as an ordinary loss the sum of \$46,392.79, by reason of the fact said loss actually occurred through the sale of stocks as hereinafter set forth, which were held by taxpayer for a period less than two years; said refusal to allow said sum as a deduction, and as an ordinary loss results in and will constitute

- (1) The taking of Petitioner's private property for public use without just or any compensation;
- (2) The taking of Petitioner's property without due process of law;

all in violation of the provisions of the Constitution of the United States of America and the amendments thereto.

(5) The facts upon which the taxpayer relies as the basis of this proceeding are as follows:

The taxpayer bought and sold on the dates as hereinafter set forth, certain stocks and securities as follows: [4]

		Date Acquired	Date Sold	Amount Received	Cost	Loss
200	Atlas Diesel B	1/15/29	12/23/31	\$ 188.00	\$ 8,804.80	\$
200	Atlas Diesel B	12/24/31	12/24/31	188.00	228.00	8,656.80
200	Interstate Eq. Preferred	9/23/29	12/23/31	1,957.00	9,600.00	
200	Interstate Eq. Preferred	12/24/31	12/24/31	1,957.00	2,085.00	7,771.00
500	Interstate Eq. Common	10/ 7/29	12/23/31	215.00	8,875.00	
500	Interstate Eq. Common	12/24/31	12/24/31	215.00	327.50	8,772.50
1,000	National Auto Fibre A	9/14/28	12/23/31 12/24/31	229.30) 585.00)	21,876.79	
1,000	National Auto Fibre A	12/24/31	12/24/31	800.00	930.00	21,192.49
Total						\$46,392.79

As a result of such purchases and sales as hereinabove set forth, the taxpayer suffered an actual loss for the year 1931 in the sum of \$46,392.79, which taxpayer reported as an ordinary loss for the year in question.

It is the contention of the taxpayer that said sum was properly taken as an ordinary loss, and was property deducted from his income for the year in question, and the Commissioner has erred in treating said sum as a capital net loss as set forth in the ninety-day letter dated September 20, 1935.

Wherefore, Petitioner prays after Answer filed on behalf of the Respondent, said matter may be set down for hearing in accordance with the law, and that upon a hearing [5] thereof, this Board determine there is no deficiency due from the Petitioner for the calendar year 1931. Taxpayer prays the Board may grant such other and further relief as may be meet and proper in the premises.

J. PAUL MILLER

Counsel for Petitioner,  
No. 1 Montgomery Street,  
San Francisco, California. [6]

State of California  
City and County of San Francisco

John Francis Neylan, being first duly sworn, deposes and says:

He is the Petitioner above named; that he has read the foregoing Petition; and is familiar with the statements contained therein, and the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JOHN FRANCIS NEYLAN

Subscribed and sworn to before me this 12 day of December, 1935.

[Seal]

LULU A. GODSIL

Notary Public in and for the City & County of  
San Francisco, State of California.

Commission expires September 13, 1939. [7]



1050M

EXHIBIT "A"

## TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

And Refer To

Sep. 20, 1935

Mr. John Francis Neylan,  
Crocker First National Bank Building,  
San Francisco, California.

Sir:

You are advised that the determination of your income tax liability for the year 1931, discloses a deficiency of \$5,613.99 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1928, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the

closing of your return(x) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By /sg/ CHAS. T. RUSSELL

Deputy Commisioner

Enclosures :

Statement

Form 870 [8]

STATEMENT

IT:AR:E-1

MKR-90D

In re: Mr. John Francis Neylan

Crocker First National Bank Building

San Francisco, California

Income Tax Liability

Year—1931

Income Tax Liability—\$15,159.35

Income Tax Assessed—\$9,545.36

Deficiency—\$5,613.99

Reference is made to a letter dated August 14, 1935 from your attorney, Mr. J. Paul Miller, in which it is stated that you do not desire to file a protest with the Bureau against the deficiency set for the in Bureau letter dated January 5, 1935. This letter of final determination is therefore being issued.

It is noted that you sold the following stocks which had been held over two years and on the same day or the following day repurchased substantially identical stocks and sold such stocks on the day repurchased:

200 Atlas Diesel B  
200 Interstate Equities Preferred  
500 Interstate Equities Common  
1,000 National Auto Fibre A

The loss of \$46,392.79 resulting from these transactions was reported as an ordinary loss.

The loss on the first sale is not allowable in accordance with section 118 of the Revenue Act of 1928. The loss on the second sale you claimed as an ordinary loss.

Income Tax Ruling 2832 published in Internal Revenue Bulletin December 3, 1934 which modified Income Tax Ruling 2443, Cumulative Bulletin VII-2, 1927 holds as follows:

“In the case of ‘wash sales’ the two-year period during which property must be held to constitute ‘Capital Assets’ within the meaning of section 101 of the Revenue Acts of 1928 and the corresponding provisions of prior Revenue acts runs from the date of the acquisition of the original securities and not from the date of repurchase.” [9]

Article 602 of Regulations 74 provides that the basis of stock acquired in “wash sales” shall be the same as the basis of the stock or securities so sold or disposed of, increased in the amount of any excess of the repurchase price over the sale price or decreased by the amount by which the sale price exceeds the repurchase price as the case may be.



	Date Acquired	Sold Date	Amount Received	Cost	Basis for Second Sale	Loss on Second Sale
200 Atlas Diesel B	1/15/29	12/23/31	\$ 188.00	\$8,804.80	\$	\$
200 Atlas Diesel B	12/24/31	12/24/31	188.00	228.00	8,844.80	8,656.80
200 Interstate Eq. Preferred	9/23/29	12/23/31	1,957.00	9,600.00		
200 Interstate Eq. Preferred	12/24/31	12/24/31	1,957.00	2,085.00	9,728.00	7,771.00
500 Interstate Eq. Common	10/ 7/29	12/23/31	215.00	8,875.00		
500 Interstate Eq. Common	12/24/31	12/24/31	215.00	327.50	8,987.50	8,772.50
1,000 National Auto Fibre A	9/14/28	12/23/31	229.30)	21,876.79		
		12/24/31	585.00)			
1,000 National Auto Fibre A	12/24/31	12/24/31	800.00	930.00	21,992.49	21,192.49
Total .....						\$46,392.79

A synopsis of your adjusted income follows:

Ordinary net income reported on return.....\$81,488.30

Add back:

Loss on stocks held to be a capital net

loss ..... 46,392.79

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Ordinary income exclusive of capital net

loss .....\$127,881.09

Capital net loss reported.....\$ 8,263.81

Add:

Capital net loss shown above..... 46,392.79

---

Adjusted capital net loss.....\$54,656.60

[10]

### Computation of Tax

Ordinary net income adjusted.....\$127,881.09

Less:

Dividends ..... 17,506.07

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Balance subject to normal tax.....\$110,375.02

Normal tax at 1½% on \$4,000.00.....\$ 60.00

Normal tax at 3% on \$4,000.00..... 120.00

Normal tax at 5% on \$102,375.02..... 5,118.75

Surtax on \$127,881.09..... 17,236.22

---

Total .....\$ 22,534.97

Less:

12½% of capital net Loss of \$54,656.60 6,832.07

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Difference .....\$ 15,702.90

Less:

Earned income credit.....	\$540.00	
Tax paid at source.....	3.55	543.55
		<hr/>
Tax liability.....		\$ 15,159.35
Tax previously assessed.....		9,545.36
		<hr/>
Deficiency .....		\$ 5,613.99

A copy of this communication is being mailed to your representative Mr. J. Paul Miller, One Montgomery Street, San Francisco, California, in accordance with the authority conferred in the power of attorney executed by you and on file with the Bureau.

[Endorsed]: U. S. B. T. A. Filed Dec. 16, 1935.

[11]

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[Title of Court and Cause.]

### ANSWER

The Commissioner of Internal Revenue for answer to the petition of the above-named taxpayer admits and denies as follows:

(1) and (2). Admits the allegations of paragraphs (1) and (2) of the petition.

(3). Admits that the taxes in controversy are income taxes for the calendar year 1931, but denies the remaining allegations of paragraph (3) of the petition.

(4) (a) to (i), inclusive. Denies the allegations of error contained in paragraphs (4) (a) to (i), inclusive, of the petition.

there is no deficiency in petitioner's income tax for that year.

In his deficiency notice the respondent has held that the loss on the first sale, that of December 23, 1931, was not allowable in accordance with section 118 of the Revenue Act of 1928, and that the loss on the second sale, that of December 24, 1931, was a capital loss and not an ordinary loss, under Income Tax Ruling (I. T.) 2832, Cumulative Bulletin XIII-2, page 201.

The identical question here in dispute was fully discussed in *Howard Heinz*, 34 B. T. A. 885, where we held, favorably to the petitioner's contention in this proceeding, that a loss resulting from the sale of securities under facts substantially the same as those obtaining here was an ordinary loss and not a capital net loss. That case was followed in *Wadsworth R. Lewis*, 34 B. T. A. 996. Upon authority of those cases it is held that the loss sustained by the petitioner in the amount of \$46,392.79 was an ordinary loss and is so deductible in his income tax return.

Judgment of no deficiency will be entered.

Entered Jan. 18, 1937. [15]

United States Board of Tax Appeals  
Washington

Docket No. 82451.

JOHN FRANCIS NEYLAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion entered January 18, 1937, it is

Ordered and decided: That there is no deficiency for the year 1931.

[Seal] (Signed) CHARLES P. SMITH  
Member.

Entered Jan. 18, 1937. [16]

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[Title of Court and Cause.]

PETITION FOR REVIEW AND  
ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and Charles P. Reilly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

## I.

## JURISDICTION

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office under and by virtue of the laws of the United States.

[17]

The respondent on review (hereinafter referred to as the taxpayer) is an individual with his residence in Woodside, California.

The return of the taxpayer for the calendar year 1931 was made to the Collector of Internal Revenue at San Francisco, California, whose office is located in the judicial district of the United States Circuit Court of Appeals for the Ninth Circuit.

## II.

## NATURE OF CONTROVERSY

On September 20, 1935, the Commissioner, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1928, (45 Stat. 852), as amended by Sec. 501 of the Revenue Act of 1934 (48 Stat. 755), forwarded to the taxpayer, by registered mail, a notice of deficiency, wherein the taxpayer was notified of his, the Commissioner's determination of a deficiency of \$5,613.99 in the taxpayer's income tax liability for the year 1931.

Thereafter, on December 16, 1935, the taxpayer filed a petition with the United States Board of Tax Appeals for a redetermination of the proposed



deficiency in his income tax liability for the year 1931, as shown by the notice of deficiency dated September 20, 1935, as aforesaid, which petition was assigned docket number 82,451. On January 21, 1936, the Commissioner filed with the Board of Tax Appeals his answer to the petition so filed by the taxpayer. The proceeding came on for hearing before a Division of the Board of Tax Appeals, sitting at San Francisco, [18] California, on July 6, 1936. The only issue involved was:

Where, during the year 1931, the taxpayer sold certain shares of corporate stocks at a loss, which shares, on the dates of the sales thereof, had been held by him for more than two years; and where, within less than thirty days after the dates of such sales the taxpayer purchased a like number of shares of the same stocks; and where, shortly thereafter, and during the same taxable year, the latter shares were sold, does the loss sustained by the taxpayer, computed under section 113 (a) (11) of the Revenue Act of 1928, (45 Stat. 818), constitute an ordinary loss allowable as a deduction under Section 23 (c) (2) of that Act (45 Stat. 800) ?

On December 23, 1931, the taxpayer sold a number of shares of several different blocks of stock which he had owned for more than two years. The shares sold, the date of acquisition by the taxpayer, the cost to him, and the selling price, were as follows:

Shares Sold	Date Acquired	Cost	Selling Price
200 shares Atlas Diesel B	Jan. 15, 1929	\$8,804.80	\$ 188.00
200 shares Interstate Equities, Preferred	Sept. 23, 1929	9,600.00	1,957.00
500 shares Interstate Equities, Common	Oct. 7, 1929	8,875.00	215.00
1000 shares National Auto Fibre A	Sept. 14, 1928	21,876.70	814.30
Totals		\$49,156.59	\$3,174.30

[19]

On December 24, 1931, the day following the sale of the above shares, the taxpayer purchased a like number of the same shares and later during that day sold the shares so purchased. The cost and selling price of those shares were as follows:

Shares Sold	Cost	Selling Price
200 shares Atlas Diesel B	\$ 228.00	\$ 188.00
200 shares Interstate Equities, Preferred	2,085.00	1,957.00
500 shares Interstate Equities, Common	327.50	215.00
1000 shares National Auto Fibre A	930.00	800.00
Totals	\$3,570.50	\$3,160.00

As a result of the several transactions outlined above the taxpayer was actually out of pocket the net amount of \$46,392.79. He claimed that amount as an ordinary loss in his income tax return for 1931.

In the deficiency notice the Commissioner disallowed the aforesaid loss as an ordinary loss but allowed the same as a capital net loss in accordance with Section 101 (c) (2) of the Revenue Act of 1928 (45 Stat. 811) and computed the tax liability accordingly.

On January 19, 1937, the Board of Tax Appeals promulgated its report (memorandum opinion) in this proceeding, wherein it was held that the loss



sustained by the taxpayer as a result of the sales of the shares of stocks during the year 1931, as aforesaid, constitutes an ordinary loss, allowable as a deduction under Section 23 (e) (2) of the Revenue Act of 1928, (43 Stat. 800). On January 18, 1937, the Board entered its decision in this proceeding, wherein it was ordered, adjudged and decided that, in accordance with its memorandum opinion, [20] there is no deficiency due from the taxpayer for the year 1931.

### III.

#### ASSIGNMENTS OF ERROR

That the said Commissioner, being aggrieved by the opinion and decision of the United States Board of Tax Appeals desires a review thereof, in accordance with the statutes in such cases made and provided, by the United States Circuit Court of Appeals for the Ninth Circuit in which power of such review is vested, and as reasons for such review he alleges that the Board in rendering its opinion and in entering its decision committed the following errors:

(1) The Board erred in holding and deciding that the taxpayer sustained an ordinary loss during the year 1931.

(2) The Board erred in not holding and deciding that the taxpayer did not sustain an ordinary loss during the year 1931.

(3) The Board erred in holding and deciding that the taxpayer did not sustain a capital loss during the year 1931.

(4) The Board erred in not holding and deciding that the taxpayer sustained a capital loss during the year 1931.

(5) The Board erred in holding and deciding that the transactions by which the taxpayer sold and/or disposed of 200 shares of Atlas Diesels B, 200 shares of Interstate Equities, Preferred, 500 shares of Interstate Equities, Common, and 1000 shares of National Auto Fibre A, during the year 1931, resulted in a loss deductible as and for an ordinary loss.

(6) The Board erred in not holding and deciding that the transactions by which the taxpayer sold and/or disposed of 200 shares of Atlas Diesel B, 200 shares of Inetrstate Equities, Preferred, 500 shares of Interstate Equities, Common, and 1000 shares of National Auto Fibre A, during the year 1931, resulted in a loss, deductible as and for a capital loss. [21]

(7) The Board erred in not finding that the loss of \$46,392.79 sustained by the taxpayer during the year 1931, resulted from the sale by him during that year of capital assets, within the meaning of Section 101 (e) (8) of the Revenue Act of 1928, (45 Stat. 811).

(8) The Board erred in ordering, adjudging and deciding that there is no deficiency due from the taxpayer for the year 1931.

(9) The Board erred in not ordering, adjudging and deciding that there is a deficiency due from the taxpayer for the year 1931 in the amount of \$5,613.99.

(10) The Board erred in entering judgment in favor of the taxpayer.

(11) The Board erred in not entering judgment in favor of the Commissioner.

Wherefore, the Commissioner petitions that the opinion and decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

JAMES W. MORRIS

Assistant Attorney General.

(Signed) MORRISON SHAFROTH

Chief Counsel,

Bureau of Internal Revenue.

CHARLES P. RIELLY

Special Attorney, Bureau of  
Internal Revenue.

[22]

United States of America

District of Columbia—ss.

Charles P. Reilly, being duly sworn, says that he is a Special Attorney of the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own

knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

CHARLES P. REILLY

Sworn and subscribed to before me this 13th day of April, 1937.

GEORGE W. KRIES

Notary Public.

My commission expires November 16, 1937.

[Endorsed]: U. S. B. T. A. Filed Apr. 13, 1937.

[23]

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[Title of Court and Cause.]

NOTICE OF FILING PETITION  
FOR REVIEW

To:

Mr. John Francis Neylan.  
198 Mountain Home Road.  
Woodside, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of April, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for

review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of April, 1937.

(Signed) MORRISON SHAFROTH  
Chief Counsel,  
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 16th day of April, 1937.

JOHN FRANCIS NEYLAN  
Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Apr. 21, 1937.

[24]

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[Title of Court and Cause.]

### STIPULATION OF FACTS

It is hereby stipulated and agreed by and between parties hereto, by their respective attorneys of record, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

(1) That the petitioner, John Francis Neylan, is an individual with his residence at 198 Mountain Home Road, Woodside, California.

(2) That the Notice of Deficiency herein was mailed by the Commissioner of Internal Revenue



chased the said 500 shares of Interstate Equities Common, for the sum of \$8,875.00; that petitioner sold these 500 shares on December 23, 1931, for the sum of \$215.00; that on December 24, 1931, petitioner purchased 500 shares of Interstate Equities, Common, for the sum of \$327.50, and thereafter and on said December 24, 1931, sold said 500 shares for the sum of \$215.00; that petitioner's actual out of pocket loss as a result of these transactions was and is the sum of \$8,772.50.

(d) That on September 14, 1928, the petitioner purchased the said 1,000 shares of National Auto Fibre A for the sum of \$21,876.79; that petitioner sold these 1,000 shares on December 23, 1931 and December 24, 1931 for the sum of \$814.30; that thereafter and on [27] December 24, 1931, petitioner purchased 1,000 shares of National Auto Fibre A for the sum of \$930.00, and thereafter and on said December 24, 1931, sold said 1,000 shares for the sum of \$800.00; that petitioner's actual out of pocket loss, as a result of these transactions was and is the sum of \$21,192.49.

(e) That petitioner's actual out of pocket loss, as a result of all of the transactions set forth in the aforesaid paragraphs was and is the sum of \$46,392.79.

(f) That all purchases and sales referred to in the foregoing paragraphs were made in the open market and at the current market prices.

(10) (a) That the petitioner deducted the aforesaid loss of \$46,392.79 as an ordinary loss in his Income Tax Return filed for the year 1931.

(b) That in the audit of said Return the Respondent disallowed the aforesaid loss as an ordinary loss, but allowed the same as a capital net loss.

(11) It is further stipulated that if the action of the petitioner in claiming the loss of \$46,392.79 as an ordinary loss was correct, there is no deficiency due from the petitioner for the year 1931 and the Board may enter an Order to that effect, but if the loss was a capital net loss, the Board may enter an Order fixing the deficiency in the sum of \$5,-613.99, together with interest thereon as required by law.

Dated: June 24, 1936.

J. PAUL MILLER,

Attorney for Petitioner.

HERMAN OLIPHANT      OWS

General Counsel for the Department of the Treasury.

Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed at hearing July 6, 1936. [28]

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[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records

in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board.

(a) Petition, including annexed copy of notice of deficiency.

(b) Answer.

3. Memorandum opinion of the Board.

4. Decision of the Board.

5. Petition for review, together with proofs of service of notices of filing petition for review and of service of copies of petition for review.

6. Stipulation of facts filed at hearing before the Board. [29]

7. This praecipe.

(Signed) MORRISON SHAFROTH  
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 7th day of June, 1937.

(Signed) J. PAUL MILLER,

Attorney for Respondent.

[Endorsed]: U. S. B. T. A. Filed July 7, 1937.

[30]

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[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax



Appeals, do hereby certify that the foregoing pages, 1 to 30, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 17th day of July, 1937.

[Seal]

B. D. GAMBLE,

Clerk,

United States Board of Tax  
Appeals.

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[Endorsed]: No. 8606. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. John Francis Neylan, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed July 21, 1937.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

